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NO. 88-1547

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HAROLD JAMES BAERT,
RESPONDENT.

REPLY

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TABLE OF CONTENTS

	Pages
REPLY	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Pages
Bouie v. Columbia, 378 U.S. 347 (1964)	2-5
Cabana v. Bullock, 474 U.S. 376 (1986)	7
Carlos v. Superior Court, 35 Cal.3d 131 (1983)	2, 5-7
Cole v. Young, 817 F.2d 412 (7th Cir. 1987)	3
Darnell v. Swinney, 823 F.2d 299 (9th Cir. 1987)	2, 4
In re Ramirez, 39 Cal.3d 931 (1985)	6
Marks v. United States, 430 U.S. 188 (1977)	5

Cases (continued)	Pages
Maynard v. Cartwright, 486 U.S. ___ (1988)	2, 3
Miller v. Florida, 482 U.S. 423 (1987)	5
Moore v. Wyrick, 766 F.2d 1253 (8th Cir. 1985)	3, 4
Morrissey v. Brewer, 408 U.S. 471 (1972)	6
People v. Garcia, 36 Cal.3d 539 (1984)	5
People v. Malone, 47 Cal.3d 1 (1988)	2, 7
People v. Poggi, 45 Cal.3d 306 (1985)	6
People v. Robert Clark, Unpub. Cal. App. No. G006488 (May 31, 1989)	3
People v. Sobick, 30 Cal.App.3d 458 (1973)	5
People v. Weidert, 39 Cal.3d 836 (1985)	7
People v. Anderson, 43 Cal.3d 1104 (1987)	1, 2, 5-7

Cases (continued) — Pages

Tison v. Arizona, 481 U.S. 137 (1987) — 7

Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985) — 6

United States Constitution

Article I, §§ 9, 10 — 6

California Penal Code

Section 190.2, subds. (a)(17)(i), (iii) — 8

Rules Of The United States Supreme Court

Rule 22.5 — 1

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REPLY

As permitted by rule 22.5, the People of the State of California[1] reply to the Brief of Respondent in Opposition[2] to the People's Petition for Writ of Certiorari[3].

In trying to restate the question presented in this case, BRO at i, respondent Baert fell into the same trap as the court below. The assumption underlying his attempted restatement of the question presented is that the *Anderson*[4] case changed California law. Not so. *The law*, as enacted by California

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1. Hereinafter, People.

2. Hereinafter, BRO.

3. Hereinafter, Petition.

4. *People v. Anderson*, 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306 (1987).

voters, was on the books before *Anderson*, before *Carlos*,[5] and at the time of the alleged murder of Mrs. McAlindon by Baert. It is only the state court's view of the law that has changed. Whereas the California Supreme Court at first viewed the statute as ambiguous, see *People v. Malone*, 47 Cal.3d 1, 25, 252 Cal.Rptr. 525, 762 P.2d 1249 (1988), *modified* 47 Cal.3d 745a, it later concluded that no "*realistic* doubt" exists as to the meaning of the statute. *People v. Anderson*, 43 Cal.3d at 1146. The People of the State of California present this Court not a question of ex post facto involving changes in the law, but of due process involving notice. They are not the same and the rules for applying them are different.

The proposition advanced here by the People is not "that a state is not bound by its own laws," BRO at 6, but, instead, that the state may fairly apply its law to Baert as the law existed at the time of the murder of Mrs. McAlindon. In other words, *Carlos* did not dispel the presumed notice afforded by the statute to Baert and similarly-situated murderers, and application of the statute to them satisfies due process. See *Darnell v. Swinney*, 823 F.2d 299, 300-301 (9th Cir. 1987), *cert. denied* 98 L.Ed.2d 978, 108 S.Ct. 1012.

This Court has recently said that due process objections resting on lack of notice and not involving First Amendment interests "may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. ___, ___, 100 L.Ed.2d 372, 380, 108 S.Ct. 1853, 1858 (1988). Thus, the application of due process principles prevented prosecution of the defendants in *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), because they had no way of knowing that their conduct was at risk under the statute South Carolina used to prosecute them.

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5. *Carlos v. Superior Court*, 35 Cal.3d 131, 152, 197 Cal.Rptr. 79, 672 P.2d 862 (1983), *overruled in Anderson*, 43 Cal.3d at 1115, 1147.

When viewed in this light, the issue in this case warrants this Court's resolution. Absent that resolution, lower courts will continue to mistake concerns of due process for those of ex post facto, as did (1) the court below, (2) the Eighth Circuit in the case relied upon by the court below[6] and by Baert,[7] *Moore v. Wyrick*, 766 F.2d 1253 (1985), *cert. denied*, 477 U.S. 1032, 89 L.Ed.2d 350, 106 S.Ct. 1242, and (3) the Seventh Circuit in another case relied upon by Baert,[8] *Cole v. Young*, 817 F.2d 412, 420-421 (1987), and, as Baert indicates, as even California law enforcement officers have done. BRO at 8-9.[9] "The net result is that [*Bouie* has been stretched] far beyond its reasoning and its holding." *Moore v. Wyrick* at 1261 (Gibson, Cir.J., dissenting). None of these federal cases relied upon by Baert have analyzed under the particular facts of their case whether "reasonable persons would [have known] that their conduct was at risk." *Maynard v. Cartwright*, 100 L.Ed.2d at 380.

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6. Petition at A-7 [205 Cal.App.3d at 520].

7. BRO at 2, 16.

8. BRO at 20.

9. Baert characterizes the issue in this case as "unique to Los Angeles County." BRO at 11. But that ignores federal cases from other states, some of which Baert has relied upon, that have wrestled with the same issue. The California Attorney General's office, although once espousing the view set forth in Appendix A of Baert's opposition to certiorari, has, through one of its deputies, informed this office that the Attorney General's office is presently defending the position taken by the People in this case in at least one appeal pending in the state courts. That case arises from San Diego, not Los Angeles, County, and has resulted, thus far, in an unpublished opinion from the California Court of Appeal, Fourth District, Division Three, in *People v. Robert Clark*, No. G006488 (May 31, 1989). The court in *Clark* reversed the conviction, relying upon the published decision by the court below in this case. The Attorney General has represented that if this Court grants certiorari in this case, then the People will seek review in the California Supreme Court of the *Clark* opinion before it becomes final. Obviously, this case touches more than just the eight and a half million residents of Los Angeles County, or even the much larger population of the state.

At least one federal court has refused to so stretch *Bouie*, and has analyzed the issue in proper due process terms. That case is *Darnell v. Swinney*, 823 F.2d at 300-301. Darnell argued to the Ninth Circuit that his Nevada conviction was unconstitutional under *Bouie* because under a long-standing state judicial decision his crime could not exist. In affirming his conviction, the state supreme court overruled the old case. The federal court rejected Darnell's argument that *Bouie* required voiding of his conviction, saying,

> In the present case, however, Darnell clearly had fair warning that his contemplated conduct--attempting to possess stolen property--was criminal. Thus, even if it is assumed that the Nevada Supreme Court's interpretation of Section 208.070 changed Nevada's law of criminal attempt, Darnell has failed to show that this change resulted in any surprise that affected his conduct. Nor has he shown that he was unfairly surprised in a way that affected his legal defense, since he conducted that defense with full notice that Section 280.070 was being construed against him. We therefore hold that Darnell's conviction did not violate his right to due process.

823 F.2d at 301. As in *Moore v. Wyrick*, this Court also denied a petition for certiorari in *Darnell v. Swinney*. They are at odds.

Recognition that Baert's arguments to this Court in opposition to the Petition rely upon an ex post facto rather than a due process analysis sheds light on the fallacy of his argument. For instance, and although Baert says it is "unsupported by any authority," BRO at 28, the People have cited federal authority for the proposition that only when a criminal defendant proves actual reliance upon an erroneous judicial interpretation of a statute may he rely upon it. Petition at 17.

The People admit that under an ex post facto analysis, the proposition, while not "illogical," BRO at 28, fails. But that failure is irrelevant, because under a due process analysis, the proposition succeeds, and, in fact, seems to be the very point of due process. Despite urgings to the contrary, no court has yet taken the time to apply that kind of an analysis in this case.

"[T]he [Ex Post Facto] Clauses were aimed at preventing legislative abuses" and at "a second concern, namely, that legislative enactments 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.' [Citation.]" *Miller v. Florida*, 482 U.S. 423, __, 96 L.Ed.2d 351, 359, 107 S.Ct. 2446, 2451 (1987). In *Baert*, the Court of Appeal took the stance in effect that due process mirrors the Ex Post Facto Clauses. Petition at A-1 to A-2, A-6 to A-10 [205 Cal.App.3d at 516, 519-522]. But this Court's cases which have analogized due process to ex post facto have done so because they involved (1) freedom of expression, *Marks v. United States* 430 U.S. 188, 192, 51 L.Ed.2d 260, 97 S.Ct. 990 (1977) or (2) regulation of conduct which is not immoral, as in *Bouie*, and then have done so after consideration of the facts of the cases, a concern not present in an ex post facto analysis. Absent the concerns present in those two kinds of cases, a judicial clarification of the law, when reasonable, and in spite of a previous unwarranted judicial declaration to the contrary, applies retroactively to immoral conduct without offending due process. *People v. Sobiek* 30 Cal.App.3d 458, 472, 106 Cal.Rptr. 519, 82 A.L.R.3d 804 (1973), *cert. denied*, 414 U.S. 855.

The difference between genuine ex post facto concerns and those raised by the judicial analogy to the Ex Post Facto Clauses can be seen by looking at the retroactive effect thus far given by the California Supreme Court to *Carlos* and *Anderson* and comparing that with the legislature's inability to do the same thing. *People v. Garcia* 36 Cal.3d 539, 547-549 (1984), made *Carlos* retroactive. But *People v. Poggi* 45 Cal.3d

306, 326-327 (1985), made *Anderson* retroactive over those murders committed before *Carlos*. Thus, the state court has applied two contrary constructions of the law to murders committed during the period preceding *Carlos*. The People's burden of proof would, therefore, have been different for two murders committed on the same day if one came to trial before *Anderson* and the other came to trial after *Anderson*. A legislature could never achieve that result. However, the *Anderson* Court recognized that *Carlos* was not the law, but an incorrect statement of the law. The law had been stated by the initiative enacted by the voters for all to see and read. *Carlos* tried and erred, to the benefit of some murderers whose trials occurred before the Court decided *Anderson*. There is no reason now to perpetuate the error of *Carlos*.

The Constitution makes explicit the prohibition on a *legislature*'s attempt to reach out ex post facto. U.S. CONST., art. I, §§ 9, 10. The relative inflexibility accompanying the prohibition on ex post facto application of a penal statute, involving nothing more than a determination of whether the statute is retrospective and whether it disadvantages the accused *In re Ramirez*, 39 Cal.3d 931, 934-938, 218 Cal.Rptr. 324, 705 P.2d 897 (1985), ought not to be carried over to its judicial analog, especially when such a carry-over would void the effect of legislation predating the alleged criminal activity. The requirements of due process are more flexible. *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494, 92 S.Ct. 2593, 2600 (1972).

"The requirements of due process cannot be determined in a vacuum: 'Due process 'is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. at 481[, 486-487]." *Whitehorn v. Harrelson*, 758 F.2d 1416, 1425 (11th Cir. 1985), brackets added. Lack of notice, therefore, should violate due process only when notice is expected to be of some genuine use. This Court has not held otherwise. Any need of Baert or alleged

murderers who are similarly-situated, for more notice than he had from the statute itself has not yet been shown; indeed, it realistically cannot be shown. See *People v. Weidert*, 39 Cal.3d 836, 860, 218 Cal.Rptr. 57, 705 P.2d 380 (1985) (Lucas, J., concurring and dissenting).[10]

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10. Respondent Baert's brief in this Court includes a two-plus page footnote attacking the People's supposed reliance upon *Tison v. Arizona*, 481 U.S. 137, 95 L.Ed.2d 127, 107 S.Ct. 1676 (1987), and *Cabana v. Bullock*, 474 U.S. 376, 88 L.Ed.2d 704, 106 S.Ct. 689 (1986) "as undermining *Carlos*." BRO at 24-26, n. 2. However, no reference to those cases appears in the People's Petition for Writ of Certiorari, except to *Tison* in the opinion of the court below contained in the appendix. Petition at A-7 to A-8. As stated in the People's Petition for Rehearing in the court below,

> In addition, we wish to de-emphasize the role which this Court attributes to the case of *Tison* v. *Arizona* (1987) 481 U.S. __ [95 L.Ed.2d 127, 109 S.Ct. 1676] in support of the People's position in this Court. While we recognized that the Superior Court relied upon *Tison* (Ret. & Answ., ¶ G., p. 5), our position here has never been that Baert need be presumed acquainted with the *Tison* case, but merely presumed to have known the law as stated in the relevant California statutes in order for the statute to be applied to him as among the class of murderers to whom the People intended the statute apply even before *Carlos* was decided. (Ret. & Answ., pp. 15-16, fn. 14; *People* v. *Malone*, *supra*.)

Petition for Rehearing filed Nov. 10, 1988, in the California Court of Appeal, Second Appellate District, Division Three, at 4-5. The People's position has not changed in this Court.

The People do contend that *Carlos* was an unreasonable decision and, contrary to Baert's assertion, BRO at 27, find support for that contention in the language used in *Anderson*. Petition at 12.

CONCLUSION

The state statute gave Baert notice that murder committed during the robbery and rape of Janet McAlindon justified a penalty of death. CAL. PEN. CODE, § 190.2, subds. (a)(17)(i), (iii). The notice it gave was all the federal constitution requires. It does not require that he be presumed to have acted on an erroneous construction of the statute which has been corrected. This Court should grant certiorari.

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